

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**Nashville, Tennessee**

**May 29, 2002**

<b>In Re:</b>	<b>Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element.</b>	) ) ) ) )	<b>Docket No. 02-00207</b>
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**INITIAL ORDER GRANTING MOTIONS TO AMEND PETITION AND TO  
RECONSIDER FIRST REPORT AND RECOMMENDATION**

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This matter is before the Hearing Officer, Director Melvin J. Malone, on the Coalition's *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*. BellSouth Telecommunications, Inc. ("BellSouth") notified the Tennessee Regulatory Authority ("TRA" or "Authority") that it does not intend to file a response to the motions.<sup>1</sup> For the reasons set forth herein, the motions are granted.

**I. Travel of the Case**

On February 25, 2002, the Tennessee UNE-P Coalition (the "Coalition")<sup>2</sup> filed its *Petition to Open Contested Case Proceeding* ("*Petition*") with the Authority. In the *Petition*, the Coalition requested that the Authority convene a contested case to establish local switching as an unrestricted, unbundled network element ("UNE") on a statewide basis. On February 26, 2002, the Authority granted the Coalition's request that this proceeding be convened as a contested

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<sup>1</sup> See May 23, 2002, letter from BellSouth, TRA Docket No. 02-00207.

<sup>2</sup> The Coalition includes: Access Integrated Networks, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCI metro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

case. Having timely resolved certain preliminary legal issues in this matter,<sup>3</sup> the Hearing Officer concluded that it was necessary for the Authority to address the statutory manner in which this matter should proceed. On May 13, 2002, the Hearing Officer, after applying the Tennessee Court of Appeals' *Tennessee Cable Television Association v. Tennessee Public Service Commission*<sup>4</sup> decision, recommended "that any substantive action taken on the issues raised in the *Petition* is more properly executed within a rulemaking framework."<sup>5</sup>

## II. Discussion and Analysis

In its *Petition*, the Coalition requested that this matter proceed as a contested case, and this request was granted by the Authority. In preparing this matter for hearing, however, the Hearing Officer was compelled, given the nature of the relief requested, to consider whether a contested case was the appropriate procedural vehicle with which to move forward. Specifically, the recognition that the Coalition's plea for statewide relief for all competing local telephone providers would have required the prescription of a broad policy by the Authority, with a reach far beyond the parties to this proceeding, mandated the aforesaid consideration.

As noted in the *First Report and Recommendation*, the Authority has substantial discretion to establish policy either through rulemaking or adjudication.<sup>6</sup> This discretion, however, is not unlimited.<sup>7</sup> In addressing the question at hand, the Hearing Officer relied upon the Tennessee Court of Appeals' *Tennessee Cable Television Association v. Tennessee Public Service Commission* decision.

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<sup>3</sup> See *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)*, TRA Docket No. 02-00207 (Mar. 25, 2002); *Initial Order Denying BellSouth's Motion to Dismiss and to Strike*, TRA Docket No. 02-00207 (April 9, 2002).

<sup>4</sup> 844 S.W.2d 151 (Tenn. Ct. App. 1992).

<sup>5</sup> *First Report and Recommendation*, TRA Docket No. 02-00207, p. 6 (May 13, 2002).

<sup>6</sup> *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 160 (Tenn. Ct. App. 1992).

<sup>7</sup> *Id.* at 162.

The Tennessee Court of Appeals declared in *Tennessee Cable* that rulemaking is the preferable way to formulate new policies, rules, or standards and adopted the Supreme Court of New Jersey's *Metromedia* test<sup>8</sup> for determining whether an agency's actions should be undertaken in the form of a rulemaking.<sup>9</sup> Under the *Metromedia* test, an agency determination should take the form of a rulemaking if it appears, in many or most of the following circumstances, that the agency determination

(1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.<sup>10</sup>

After fairly applying the *Metromedia* test to the *Petition*, the Hearing Officer concluded that "the intent of the Tennessee Court of Appeals is better upheld and adhered to by subjecting this proceeding to a rulemaking."<sup>11</sup>

The Coalition submitted the motions to amend and to reconsider in response to the *First Report and Recommendation*. In its motion to amend, the Coalition maintains that:

Despite the broad language in the caption and body of the *Petition*, the Coalition did not intend this proceeding to apply to incumbent local exchange carriers other than BellSouth. In this proceeding, the Coalition asks only that the Authority make circuit switching available as an unbundled network element in BellSouth's territory, not on a statewide basis.<sup>12</sup>

<sup>8</sup> See *Metromedia, Inc. v. Director, Div. of Taxation*, 97 N.J. 313, 478 A.2d 742, 751 (1984).

<sup>9</sup> *Tennessee Cable Television Ass'n*, 844 S.W.2d at 162-63.

<sup>10</sup> *Id.* at 162.

<sup>11</sup> *First Report and Recommendation*, p. 6.

<sup>12</sup> *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*, TRA Docket No. 02-00207, p. 2 (May 20, 2002).

Further, the Coalition requests “that the Petition be amended by appending the words ‘throughout the Tennessee service area of BellSouth Telecommunications, Inc.’ to both the caption and the first sentence of the Petition.”<sup>13</sup>

As BellSouth has not objected to the motion to amend, the motion is granted. Having granted the motion to amend and having reviewed the *Petition* anew, the Hearing Officer has determined that it is appropriate and consistent with the *Tennessee Cable* decision to proceed with this matter as a contested case.<sup>14</sup>

### III. Conclusion

Consistent with the action of the Authority taken on February 26, 2002, and state law, this matter shall proceed as a contested case. The procedural schedule in this matter is as follows:

- Discovery requests shall be filed with the Authority and served by 2:00 p.m., Friday, May 24, 2002.
- A proposed protective order shall be filed by 2:00 p.m., Friday, May 24, 2002.
- Objections to discovery requests shall be filed with the Authority and served by 2:00 p.m., Friday, May 31, 2002.
- Responses to discovery requests shall be filed with the Authority and served by 2:00 p.m., Friday, June 7, 2002.
- Pre-filed direct testimony shall be filed with the Authority and served by 2:00 p.m., Friday, June 21, 2002.
- Pre-filed rebuttal testimony shall be filed with the Authority and served by 2:00 p.m., Friday, June 28, 2002.
- The parties are directed to reserve July 22-26, 2002, for hearing.

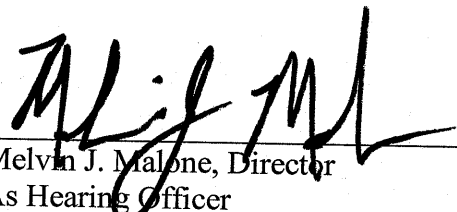
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<sup>13</sup> *Id.*

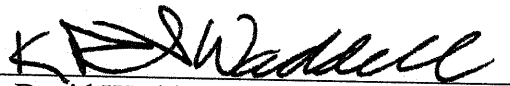
<sup>14</sup> It should also be noted that BellSouth did not oppose the motion to reconsider.

**IT IS THEREFORE ORDERED THAT:**

1. The Coalition's *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation* is granted, and this matter shall proceed as a contested case.
2. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.
3. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

  
Melvin J. Malone, Director  
As Hearing Officer

ATTEST:

  
K. David Waddell, Executive Secretary